

## CERCLA Arranger Liability and the Intent to Dispose of Hazardous Waste

**UNDER THE COMPREHENSIVE Environmental Response, Compensation, and Liability Act (CERCLA), a party that has arranged to dispose of a hazardous substance may be held liable for the damage that hazardous substance does to the environment. Whether a party is liable under CERCLA often depends on the answer to the question of whether**

the party “arranged” to dispose of the substance. The cost of being found liable under CERCLA is often substantial, and companies do not want to be considered “arrangers” under CERCLA. When determining CERCLA liability, the question facing many courts, companies, and practitioners is whether a company arranged to dispose of a hazardous substance or whether a company sold the hazardous substance for a legitimate business purpose. If a company sold the hazardous substance for a legitimate business purpose, that company is not liable as an arranger under CERCLA.<sup>1</sup>

When determining arranger liability, much of the focus is on the company’s intent at the time the company got rid of the hazardous substance. Under CERCLA’s arranger liability, if a company intended to dispose of a hazardous substance the company may be liable for environmental damage caused by the substance, whereas a company that sold a hazardous substance for a useful purpose is not liable under CERCLA’s arranger liability theory (as discussed in the section below, headed “Recent Arranger Liability Case Law”). To determine intent, various courts have historically considered different aspects of the transaction as well as the company’s knowledge.

Several years ago, the U.S. Supreme Court issued an opinion limiting the scope of arranger liability in a pivotal case decided in 2009, *Burlington Northern & Santa Fe Railway Co. v. United States*. The Supreme Court held that, “under the plain language of [CERCLA], an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance.”<sup>2</sup> (An “arranger” is defined “any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances ... .”<sup>3</sup>) In other words, absent an intent to dispose of a hazardous substance, a party cannot have arranger liability under CERCLA.

Over the past few years, courts around the country have attempted to apply this refined arranger liability scheme to determine CERCLA liability. Since *Burlington Northern*, courts have strived to define the difference between a party that arranged for the disposal of hazardous material and a party that sold the hazardous material for a useful purpose.

In 2011, multiple legal decisions resulted in significant case law clarifying what it means to have the “intent” to dispose of a hazardous substance. This article discusses these important decisions and their potential ramifications on the interpretation of arranger liability under CERCLA. As the scope of arranger liability shifts, a company’s potential for liability changes; this change could result in saving or spending a significant amount of money.

### Background

By way of a very brief background, CERCLA was enacted in 1980 and provides liability for individuals who release hazardous substances into the environment. People and companies who may be liable under CERCLA are called “potentially responsible parties.” “CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs [potentially responsible parties],” including “any person who by contract, agreement or otherwise arranged for disposal or treatment ... of hazardous substances ... .”<sup>4</sup>—in other words, on arrangers. “[U]nder the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance.”

*Burlington Northern & Santa Fe Railway Co. v. United States* narrowed the definition of “arranger” for purposes of CERCLA liability. In the *Burlington Northern* case, one of the parties, Shell Oil, sold chemicals to customers knowing that some chemicals would be spilled while in the process of transferring the chemicals to the customers, and some would be spilled when the chemicals were transferred to smaller containers at the customers’ sites. The government argued that Shell was liable as an arranger because Shell knew the chemicals would be spilled during the transferring processes; the government argued that this knowledge “was sufficient to establish Shell’s intent to dispose of hazardous substances” and thus Shell was liable as an arranger. The Supreme Court explained that, in order to have arranger liability under CERCLA, “Shell must have entered into the

sale of [the chemical] with the intention that at least a portion of the product be disposed of ... by one or more of the methods described in § 6903(3),” which is the definition of “disposal” applicable to CERCLA. The Court found that Shell’s awareness of “minor, accidental spills ... does not support an inference that Shell intended such spills to occur.” Because Shell did not intend to dispose of the chemicals it sold, the Court found that Shell was not liable under CERCLA. Shell’s knowledge that there would be some spills was not enough to show that Shell had intended for those spills to occur.

As stated in *Burlington Northern*, “there is no bright line between a sale and a disposal under CERCLA.”<sup>5</sup> Since *Burlington Northern*, courts have struggled to apply the intent factor, especially when multiple intentions might be involved. For example, if a company possesses a product that is not useful to the company but is useful to another company, and the company sells the product, the company often has the intent both to make a profit and to get rid of the useless product. In other words, the company has multiple motives for selling the product. In these “mixed motive” cases, the courts must decide whether the motive of getting rid of the product is strong enough to find the company liable as an arranger. If the motive is to dispose of the product, the company is likely to be held liable as an arranger in any future CERCLA action.

#### Recent Arranger Liability Case Law

The cases discussed below were decided in 2011 and 2012. These cases focus on the meaning of “intent” and what type of intent is necessary to be liable as an arranger under CERCLA.

#### ***Appleton Papers Inc. v. George A. Whiting Paper Co.*, 776 F. Supp. 2d. 857 (E.D. Wisc. 2011)**

In *Appleton Papers Inc. v. George A. Whiting Paper Co.*, the U.S. District Court for the Eastern District of Wisconsin applied *Burlington Northern* to determine whether one of the parties involved in the CERCLA action had the necessary intent to be found liable as an arranger.<sup>6</sup> The question at issue was whether the parties had to have an intent merely to get rid of the product or the intent to dispose of the product in a particular way. The defendants, successor companies to those involved in the transactions at issue, moved for summary judgment on the basis that the parties did not have the necessary intent.

In this case, Appleton Coated Paper Company (ACPC) was alleged to be an arranger under CERCLA as a result of its sale of a material containing polychlorinated biphenyl (PCB), a hazardous substance. The chain of events leading up to this alleged liability begins with NCR Corp.’s production of “carbonless copy paper ... by creating a PCB-laden emulsion it sent to [ACPC] which coated it on paper according to NCR’s specifications.” In creating this paper, NCR created a by-product made of paper scrap and trimmings,

known as “broke,” which contains PCBs. “ACPC sold the broke ... to paper recycling companies who used it in their own papermaking facilities.” The processes used by the recycling companies resulted in the discharge of PCBs into a river.

“The Defendants argue[d] that in selling its broke to recycling mills, ACPC ‘arranged’ to dispose of the broke, which was a hazardous substance containing PCBs, and thus Plaintiffs were liable for any environmental damage to” the river. “Plaintiffs argue[d] that although they may have intended to get rid of the broke, they never intended that it end up in the river” and therefore they did not have the required intent to be held liable as an arranger.

In determining whether the companies were arrangers, the Court said the following:

a party’s state of mind comes into play: in order to qualify as an arranger, the entity must not only have the intention to get rid of something, but the “intention” that at least a portion of the product be disposed of by one or more of the methods described in § 6903(3). As set forth in § 6903(3), the term “disposal” means “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or so that such solid waste or hazardous waste or any constituent therefore may enter the environment or be emitted into the air or discharged, into any waters, including ground waters.”

The Court further explained that the issue of whether ACPC was liable turned “on ACPC’s intent in selling the broke.” ACPC had no use for the broke and needed to get rid of it, which means ACPC “had the intent to ‘dispose’ of the broke in a general sense.” ACPC did so in a way that earned them some money. However, to be liable as an arranger, ACPC must have the intent necessary under § 6903(3) (as explained in the block quote above). The plaintiffs argued they did not intend the broke to end up in the environment or river and thus they did not have the necessary intent to be an arranger. The court stated that “ACPC—like most entities that want to dispose of waste—simply wanted someone else to deal with the broke (and make a profit in the process), and in some sense it didn’t care what happened to the broke once it was out of ACPC’s hands.”

The Court explained that the *Burlington Northern* decision should not be read too narrowly. “[I]t will be the rare case where an entity arranging to dispose of hazardous material has the specific intent that the material be deposited, leaked, etc. into land or water such that it enters the environment, which is technically what § 6903(3) requires.” The Court found that a party does not need to have the specific intent

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that the substance be released into the environment or into a specific part of the environment; the party only needs to have the general intent to dispose of or discard the material. “Put another way, if a possessor of hazardous substances hires a company to discard the substance, *Burlington Northern* does not allow him to avoid arranger liability by burying his head in the sand and claiming indifference or ignorance of how that substance is ultimately disposed.”

*Appleton Papers* is a mixed motives case in that the defendants wanted both to get rid of the broke and to make a profit. The Court explained that, even when a party sells a product, that party could still be liable as an arranger under CERCLA. A party need not have the specific intent to have the hazardous material end up in the environment but merely needs the intent to dispose of or discard the material in general.

***Shiavone v. Northeast Utilities*, 2011 WL 1106228 (D. Conn. Mar. 22, 2011)**

In *Shiavone v. Northeast Utilities*, the defendants, which are utility companies, sold their used transformers as scrap metal to the plaintiffs and the plaintiffs’ predecessors.<sup>7</sup> These transformers contained oil with PCBs, a hazardous material. The Shiavones, who owned a scrap yard, bought the transformers as scrap metal and disassembled them at their scrap yard. Later, the Shiavones undertook a state-mandated cleanup of the scrap-yard site, which cost them approximately \$1.37 million. The Shiavones then sued the defendants to recover some of the costs associated with the cleanup. The Shiavones alleged that the defendants were arrangers under CERCLA, because they had arranged for the disposal of the PCB-laden oil in the transformers by selling the transformers, which contained the PCB-laden oil, to the Shiavones.

The District Court of Connecticut found that the defendants intended to sell the transformers as scrap metal; the defendants’ intent was not to get rid of the PCB-laden oil. Even though the defendants sold the used transformers to the Shiavones, “there [was] no indication that any oil in the transformers was a factor in the parties’ thinking with respect to the transaction.”

The Court found that the defendants’ “specific intent to dispose of the transformers themselves is not enough to make them ‘arrangers’ under” CERCLA. There was no evidence that the defendants had the intent to get rid of the PCBs when they sold the used transformers as scrap metal. Because of this lack of intent to dispose of a hazardous substance, the Court found that the defendants were not arrangers for purposes of CERCLA liability and therefore granted the defendants’ motion for summary judgment.

***Team Enterprises LLC v. Western Investment Real Estate Trust*, 647 F.3d 901, 906 (9th Cir. 2011)**

In *Team Enterprises LLC v. Western Inv. Real Estate*

*Trust*, the U.S. Court of Appeals for the Ninth Circuit found that “the manufacturer of a machine used in the dry cleaning process” was not liable as an arranger under CERCLA.<sup>8</sup>

Team Enterprises operated a dry cleaning business for more than 20 years. As part of its business, Team used perchloroethylene (PCE), a hazardous substance. Team used a machine called the Puritan Rescue 800, which was “designed and manufactured by the defendant—appellee R.R. Street & Co. Inc. to filter and to recycle the PCE-laden wastewater for reuse. The Rescue 800 returned distilled PCE to Team’s dry cleaning machines and deposited the resulting wastewater into an open bucket.” This wastewater also contained some PCE. “Team disposed of this wastewater by pouring it down the sewer drain. Some of the PCE then leaked into the soil.” The state of California ordered Team to clean up the contaminated property. Team then sued Street and several other defendants under CERCLA to recover money Team had spent on the cleanup.

Team argued that the design of the Rescue 800 “render[ed] disposal [of PCE] inevitable” and that Street thus intended that the PCE be disposed of. The Court said “[a]t most, the design indicates that Street was indifferent to the possibility that Team would pour PCE down the drain.” Indifference is not sufficient for CERCLA arranger liability. The Court said that “[a]bsent a showing that Street intended for its sale of the Rescue 800 to result in the disposal of PCE ... Street lacks the requisite intent for arranger liability.” The Ninth Circuit stated that, “to satisfy the intent requirement” under CERCLA, a company is not liable as an arranger, “unless the plaintiff proves that the company entered into the relevant transaction with *the specific purpose* of disposing of a hazardous substance.” In *Team Enterprises*, Street did not intend for the PCE to be released into the environment and was therefore not liable as an arranger under CERCLA.

***United States v. General Electric Company*, 670 F.3d 377 (1st Cir. 2012)**

In February 2012, the U.S. Court of Appeals for the First Circuit issued its opinion in *United States v. General Electric Company*, discussing whether General Electric had the necessary intent to be liable as an arranger under CERCLA.<sup>9</sup>

For approximately 30 years, GE manufactured electric capacitors that contained Pyranol, which is made from PCBs, a hazardous substance. For the Pyranol to be useful to GE, the processed Pyranol had to meet specific purity standards. Any Pyranol that failed to meet these standards was determined to be “scrap Pyranol” and was stored in 55-gallon containers in a designated scrap area. At some point, Fred Fletcher, a paint manufacturer, began purchasing the scrap Pyranol at bargain prices and used it to make paint.

About 10 years into the business relationship between GE and Fletcher, GE sent Fletcher a letter referring to Fletcher's failure to pay for some of the scrap Pyranol. In response to this letter, Fletcher sent a letter to GE stating that the scrap Pyranol he had been receiving from GE had decreased in quality; Fletcher requested that GE pick up the unused drums of scrap Pyranol from Fletcher's business. This exchange of letters resulted in the end of the relationship between Fletcher and GE. Fletcher did not pay for many of the drums of scrap Pyranol and GE did not pick up the unused material. Years later, the Environmental Protection Agency "found hundreds of drums containing scrap Pyranol and other chemicals at the Fletcher Site." Many of these scrap Pyranol drums had leaked scrap Pyranol into the environment.

The facts in this case showed that GE had decided how much scrap Pyranol to send Fletcher, continued to send it to Fletcher after he had stopped paying, failed to advertise the scrap Pyranol as a useful material to any other company, and looked into other methods of disposal of the scrap Pyranol, such as sending the material to landfills. After analyzing these facts, the Court said that the facts were sufficient to "establish that GE purposefully entered into its arrangement with Fletcher with the desire to be rid of the scrap Pyranol." The Court explained that GE knew Fletcher would dispose of the scrap Pyranol and GE "took the conscious and intentional step of leaving Fletcher to dispose of the materials." In sum, even though GE had sold the scrap Pyranol to Fletcher, it was clear that GE's main goal was to get rid of the scrap Pyranol. Because of this, GE was found to be an arranger for purposes of CERCLA liability.

### Conclusions and Implications

Taken together, the cases decided in 2011 through March 2012 show that, after *Burlington Northern*, to be liable as an arranger under the Comprehensive Environmental Response, Compensation, and Liability Act, a company selling a hazardous substance must have the specific intent to get rid of the hazardous substance itself (as opposed to selling a product containing a hazardous substance). It is not enough for a company to sell a material that contains a hazardous

substance; the transaction must, at least in part, be undertaken with the goal of getting rid of the hazardous substance. Even though the company must want to rid itself of the hazardous material, the company does not need a specific intent that the hazardous substance be released into the environment in order for that company to be held liable as an arranger. Knowledge that the hazardous substance is, or may be, released into the environment is not enough, by itself, to make the company selling the hazardous material an "arranger" for purposes of CERCLA liability. In sum, to be liable as an arranger, a company needs to have the specific intent of ridding itself of the hazardous substance. **TFL**

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*Alexandra E. Shea is an associate with Mayer Brown LLP. She focuses on litigation, transactional, and regulatory issues arising in the environmental law field, in addition to her work on toxic tort litigation. © 2012 Alexandra E. Shea. All rights reserved.*



### Endnotes

<sup>1</sup>This is known as the "useful product doctrine" or "useful product defense" and is a defense to arranger liability under CERCLA. *See*, for example, *Alco Pacific Inc.*, 508 F.3d 930, 934 (9th Cir. 2007). "The defense prevents a seller of a useful product from being subject to arranger liability, even when the product itself is a hazardous substance that requires future disposal. In other words, a person may be subject to arranger liability 'only if the material in question constitutes waste rather than a useful product.'" *Team Enterprises LLC v. Western Inv. Real Estate Trust*, 647 F.3d 901 (9th Cir. 2011).

<sup>2</sup>129 S. Ct. 1870 (2009).

<sup>3</sup>42 U.S.C. § 9607(a)(3).

<sup>4</sup>*Burlington Northern*, 129 S. Ct. at 1878 (quoting 42 U.S.C. § 9607(a)(3)).

<sup>5</sup>*Id.* at 1879 (citing *Thomasville & Denton R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998)).

<sup>6</sup>776 F. Supp. 2d. 857 (E.D. Wisc. 2011).

<sup>7</sup>2011 WL 1106228 (D. Conn. Mar. 22, 2011).

<sup>8</sup>647 F.3d 901, 906 (9th Cir. 2011).

<sup>9</sup>670 F.3d 377 (1st Cir. 2012).

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years beginning on or after Nov. 1, 2011. In July 2011, the DOL extended the compliance deadline to plan years beginning on or after April 1, 2012. This deadline was once again extended in February 2012 by the regulations under ERISA § 408(b)(2) so that the first disclosures under the § 404(a) regulations would follow the effective date of the § 408(b)(2) regulations.

<sup>3</sup>According to the preamble of the final regulations, the DOL intends to separately publish proposed dis-

closure requirements for welfare benefit plans in the future.

<sup>4</sup>Compensation is anything of monetary value (such as money, gifts, awards, and trips) but does not include nonmonetary compensation valued at \$250 or less, in the aggregate, during the term of the service agreement.